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Expulsion of aliens

Comments and information received from Governments

I. Introduction

1. At its fifty-seventh session, in 2005, the International Law Commission decided, in accordance with article 19(2) of its Statute, to request, through the Secretary-General, Governments to submit any information concerning the practice of States, including national legislation, relating to the topic "Expulsion of aliens".[1]

2. In paragraph 4 of resolution 60/22, the General Assembly invited Governments to provide information to the International Law Commission, as requested in chapter III of the Commission's report on its fifty-seventh session,[1] regarding, inter alia, the topic "Expulsion of aliens".

3. At its fifty-ninth session, in 2007, the Commission reiterated its request for information regarding the practice of States under the topic "Expulsion of aliens", including examples of domestic legislation. The Commission welcomed in particular information and comments on specific issues relating to this topic.[2]

4. In paragraph 3 of its resolution 62/66, the General Assembly drew the attention of Governments to the importance for the International Law Commission of having their views on the various aspects involved in, inter alia, the topic "Expulsion of aliens", in particular on all the specific issues identified in chapter III of the Commission's report on the work of its fifty-ninth session.[2] In paragraph 4 of the same resolution, the General Assembly invited Governments, within the context of paragraph 3, to provide information regarding practice concerning, inter alia, the topic "Expulsion of aliens".

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[1] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 27.

[2] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 27. The issues on which the Commission invited Governments to submit comments and information are listed in section II.A below.

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5. As at 29 August 2008, written replies had been received from Germany (27 May 2008), Mauritius (12 November 2007), the Russian Federation (30 April 2008) and Switzerland (22 July 2008). These replies are reproduced in section II. Section II.A contains comments and information on the specific issues (or aspects thereof) identified by the International Law Commission, while section II.B contains comments and information on other issues relating to this topic.

II. Comments and information received from Governments

A. Comments and information on the specific issues identified by the International Law Commission

1. State practice with regard to the expulsion of nationals. Is it allowed under domestic legislation? Is it permissible under international law?

Russian Federation

[Original: English and Russian]

According to article 61 (1) of the Constitution of the Russian Federation, "a citizen of the Russian Federation may not be expelled from Russia or extradited to another State".

Switzerland

[Original: French]

1. National legislation

The expulsion of nationals is not permitted under Swiss law. This prohibition is provided for by the Federal Constitution: "Swiss citizens may not be expelled from the country; they may be handed over to a foreign authority only with their consent" (see art. 25, para. 1).

2. International law

States are prohibited from expelling their nationals by various international and regional human rights instruments.

The International Covenant on Civil and Political Rights of 16 December 1966[3] provides, in article 12, paragraph 4, that "[n]o one shall be arbitrarily deprived of the right to enter his own country". Although the Covenant does not explicitly mention a prohibition against expulsion, but rather a right to enter, the Human Rights Committee, in its general comment No. 27, notes that the right enshrined in article 12, paragraph 4, of the Covenant implicitly includes the right to remain in one's own country and, consequently, not to be expelled.[4] The term "arbitrarily" appears to suggest that only arbitrary expulsions would be prohibited

[3] United Nations, *Treaty Series*, vol. 999, p. 171 (160 States parties and 67 signatories).

[4] General comment No. 27 (1999), *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40* (A/55/40), Vol. I, annex VI, sect. A, para. 19: "The right has various facets. It implies the right to remain in one's own country."

by the Covenant. The Human Rights Committee specifies that the term "arbitrarily" is intended to emphasize that the principle applies to all State action, whether legislative, administrative or judicial, and that interference, even where provided for by law, should be in accordance with the spirit of the Covenant and reasonable in view of the circumstances.[5] Thus, the prohibition against depriving an individual of the right to enter his own country (and, thereby, the prohibition against expelling him from it) is conditional and implies that the expulsion of a national, depending on the circumstances, could be considered reasonable and admissible. Furthermore, it should be noted that the right enshrined in article 12 is derogable under article 4 of the Covenant, namely in times of public emergency threatening the life of the nation. Such derogation is subject to the conditions provided for by article 4.

At the regional level, Protocol No. 4 of 16 September 1963[6] to the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that "[n]o one shall be expelled ... from the territory of the State of which he is a national" (art. 3, para. 1). Like the European human rights regime, the American Convention on Human Rights of 22 November 1969[7] prohibits the expulsion of nationals (art. 22, para. 5). However, it should be noted that the European and American Conventions both allow States the option, in exceptional cases of war or public danger, of derogating from the prohibition against the expulsion of their own nationals, in accordance with articles 15 and 27, respectively. Article 12, paragraph 2, of the African Charter on Human and Peoples' Rights of 27 June 1981[8] also provides that every individual has the right to return to his country. However, this right may be subject to restrictions for reasons of national security, public order, health or morality, where provided for by law.

In the light of the above, it appears that the general principle of non-expulsion of nationals is largely recognized in international law, although opinions differ as to its scope and definition.

2. The manner in which persons having two or more nationalities are dealt with under expulsion legislation. Can such persons be considered aliens in the context of expulsion?

Russian Federation

[Original: English and Russian]

Under Russian legislation, a citizen of the Russian Federation possessing the nationality of another State is considered by the Russian Federation only as a citizen of the Russian Federation unless otherwise provided for by an international treaty of

[5] Ibid., para. 21: "The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances."

[6] European Treaty Series No. 46 (41 States parties, 4 signatories and 2 non-signatory States, including Switzerland). Switzerland has not signed Protocol No. 4 for reasons unrelated to the article on expulsion of nationals.

[7] United Nations, *Treaty Series*, vol. 1144, p. 123 (24 States parties, 1 signatory and 7 non-signatory States).

[8] United Nations, *Treaty Series*, vol. 1520, p. 217.

the Russian Federation or federal law" (art. 6 (1) of the Federal Law on Citizenship of the Russian Federation). Thus, the prohibition on expelling Russian nationals also covers those who possess the nationality of other States.

Switzerland

[Original: French]

The Swiss Federal Constitution provides that "Swiss citizens may not be expelled from the country".[9] It therefore appears that even if the individual in question has one or more other nationalities in addition to Swiss nationality, he cannot be expelled. A double national (one of whose nationalities is Swiss) therefore cannot be considered to be an alien as far as expulsion is concerned.

3. The question of deprivation of nationality as a possible precondition for a person's expulsion. Is such a measure allowed under domestic legislation? Is it permissible under international law?

Russian Federation

[Original: English and Russian]

In accordance with the Constitution of the Russian Federation, Russian citizens shall not be deprived of nationality (art. 6 (3)). The Federal Law mentioned above also provides for such a ban (art. 4 (4)). In the Russian Federation, the prohibition against depriving a citizen of his or her nationality is one of the principles of the institution of citizenship as a whole.

At the same time, the deprivation of nationality should be clearly distinguished from the annulment of a decision on granting nationality when it is established that an applicant has provided false data or forged documents. The annulment of a decision on granting nationality acquired by fraud is an inherent sovereign right of a State. In Russia, the procedure of annulment of a decision on granting nationality is regulated by the Federal Law on Citizenship of the Russian Federation (chap. IV).

Switzerland

[Original: French]

1. National legislation

Under Swiss law, the competent federal office may revoke Swiss nationality if three conditions have been met. First, the person in question must have dual nationality. Secondly, the person must have caused serious harm to the interests or

[9] Federal Constitution of the Swiss Confederation of 18 April 1999, art. 25, para. 1.

standing of Switzerland. Thirdly, the authority of the canton of origin must have given its consent.[10]

Furthermore, Swiss law also provides for Swiss nationality to be revoked in the five years following naturalization or reinstatement obtained by false declarations or by concealment of vital facts, even if the person becomes stateless as a result.[11]

Once an individual has been deprived of Swiss nationality, he becomes a foreign national and, consequently, may be subject to the expulsion procedure. Theoretically, it is therefore possible to deprive a person who has caused serious harm to the interests or standing of Switzerland of his Swiss nationality and then to expel that person on the grounds that he represents a threat to national security. However, the intention to expel a person is not a valid ground for revoking Swiss nationality from an individual.

2. International law

The conferment and deprivation of nationality fall within the exclusive jurisdiction of States. General international law therefore does not govern questions relating to this field. However, it attempts to minimize statelessness.[12]

States also have exclusive jurisdiction to determine the rules governing the grounds and procedures for the expulsion of aliens, provided that they respect their international obligations, including in the area of human rights.

This being the case, it is understandable that international law remains silent on the issue of whether or not the deprivation of nationality can be used as a prelude to the expulsion of an individual.

However, it should be noted that even the Convention on the Reduction of Statelessness of 30 August 1961[12] provides that States may formulate a declaration (at the time of signature or ratification) enabling them to derogate from the principle of non-deprivation of nationality resulting in statelessness, if an individual "[h]as conducted himself in a manner seriously prejudicial to the vital interests of the State".[13] While this international convention aimed at limiting statelessness provides the possibility for States to render an individual stateless, it becomes clear that there is little or no limitation on the deprivation of nationality on the grounds of national interest. It may therefore be supposed that it would be permissible, under

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[10] Federal Act on the acquisition and loss of Swiss nationality of 29 September 1952 (Nationality Act), RS 141.0, art. 48. A parliamentary initiative was submitted in December 2006 proposing an amendment to the Nationality Act so that aliens with dual nationality could, at least temporarily, be deprived of Swiss nationality if they seriously or repeatedly endangered public safety or violated the law. The competent parliamentary commission did not propose to take further action on that initiative, but the National Council has still not discussed the issue.

[11] Federal Act on the acquisition and loss of Swiss nationality of 29 September 1952 (Nationality Act), RS 141.0, art. 41. Regarding the cancellation of naturalization, even in the case of statelessness, see judgment No. 5A.22/2006 of the Federal Court of 13 July 2006, grounds 4.4 (unpublished).

[12] Convention on the Reduction of Statelessness, 30 August 1961, United Nations, *Treaty Series*, vol. 989, p. 175. It should be noted that to date this Convention has only 34 States parties and 3 signatories (Switzerland is not among these States). This reveals the reluctance of States to see questions of nationality governed by international law.

[13] Art. 8, para. 3 (a) (ii). Four States parties of 26 have made use of the possibility provided for by this provision to formulate such a reservation.

international law, for a State to deprive one of its nationals of his nationality on the grounds of occasioning serious harm to its national interests and, on the same grounds (national security), to expel him once his nationality had been revoked.

4. The question of the collective expulsion of aliens who are nationals of a State involved in an armed conflict with the host State. In such a situation, should a distinction be drawn between aliens living peacefully in the host State and those involved in activities hostile to it?

Switzerland

[Original: French]

The question of collective expulsion in cases of armed conflicts is not addressed by national legislation in Switzerland. However, at the level of international law, several human rights and international humanitarian law instruments may help to answer this question.

First of all, it is important to consider the issue of collective expulsion in the light of the principle of non-refoulement. Indeed, the prohibition of torture and inhuman or degrading treatment or punishment — which is enshrined in article 7 of the International Covenant on Civil and Political Rights of 16 December 1966[14] and article 3 of the European Convention on Human Rights,[15] and which is recognized as a peremptory norm of international law — is closely linked to the issue of expulsion. A State may not expel or return a person to a country if he or she is in danger in that country of being subjected to acts of torture or inhuman or degrading treatment or punishment, in times of peace as in times of war, irrespective of the offence with which the person concerned is charged.[16] This means that, at all times, a State must examine each case of expulsion individually in order to ensure that the expulsion under consideration does not violate the absolute prohibition of torture or inhuman or degrading treatment or punishment. Since a State is obliged to examine expulsions on a case-by-case basis, collective expulsion is strictly prohibited in times of peace as in times of war, irrespective of the offence with which the person concerned is charged.

Although the very principle of non-refoulement excludes collective expulsion in absolute terms, in the interest of completeness it is worth examining specific international humanitarian law and human rights provisions on collective expulsion.

Article 13 of the International Covenant on Civil and Political Rights stipulates that a person lawfully in the territory of a State party may not be expelled without having access to due process of law. This implies an individual examination of each case of expulsion and, consequently, the prohibition of collective expulsion. However, a State is not obliged to comply with this provision if "compelling reasons of national security" otherwise require.

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[14] United Nations, *Treaty Series*, vol. 999, p. 171.

[15] European Treaty Series No. 5.

[16] European Court of Human Rights: *Saadi v. Italy*, Grand Chamber, Judgment of 28 February 2008, para. 127. Human Rights Committee, general comment No. 20, para. 9; Communication No. 469/1991, *Chitat Ng v. Canada*; Communication No. 539/1993, *Cox v. Canada*; and Communication No. 706/1996, *G.T. v. Australia*.

Protocol No. 4 of 16 September 1963 to the European Convention for the Protection of Human Rights and Fundamental Freedoms also prohibits the collective expulsion of aliens (art. 4).[17] The Protocol remains silent on the prohibition against derogating from the rights and obligations contained within it. It therefore follows that derogating from the prohibition against collective expulsion is permissible under article 15 of the Convention (Protocol 4, art. 6). Consequently, the collective expulsion of aliens would be permitted in times of war, to the extent strictly required by the situation and provided that the measures undertaken were not inconsistent with other obligations under international law.

In implementing this provision of the Convention, it appears relevant to make a distinction between aliens living peacefully in the host State and those engaged in activities hostile to it. In fact, it would be difficult to argue that the expulsion of peaceful aliens would be required by the situation pursuant to article 15. A State expelling nationals from a State with which it is in conflict, irrespective of their involvement in the conflict, would certainly find itself in violation of article 4 of Protocol No. 4 and article 15 of the Convention. The same argument applies to the American Convention on Human Rights, which prohibits the collective expulsion of aliens (art. 22, para. 9) in the same terms as the European Convention and also provides for the option of derogation in time of war (art. 27).

Unlike the European and American regimes, the African Charter on Human and Peoples' Rights of 27 June 1981[18] states that the prohibition of the collective expulsion of aliens, enshrined in article 12, may not be subject to derogation.[18] Under the African regime, the question of the distinction between aliens living peacefully in the host State and those engaged in activities hostile to it therefore does not arise.

International humanitarian law also tends to support the principle of the prohibition of collective expulsion. Indeed, despite the fact that the Geneva Conventions do not explicitly mention the prohibition of collective expulsion, it is clear from all of the provisions that each State is obliged to examine expulsions of aliens on a case-by-case basis in order to ensure that the person concerned would not be in any danger in the country of destination.

Also noteworthy is article 44 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), of 12 August 1949,[19] which provides that refugees may not be treated as enemy aliens exclusively on the basis of their juridical attachment to an enemy State. It follows that the expulsion of a category of refugees based solely on their nationality would not be permissible. Moreover, article 12 of the Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention)[20] and article 45 of the Fourth Geneva Convention provide that prisoners of war and civilians "may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention". Furthermore, article 45 of the Fourth Geneva Convention contains a non-refoulement clause. Lastly, it is worth

[17] Switzerland has not signed Protocol No. 4 for reasons unrelated to the article on collective expulsion.

[18] Art. 12, para. 5.

[19] United Nations, *Treaty Series*, vol. 75, p. 287.

[20] Ibid., vol. 75, p. 135.

noting the commentary to article 45 of the Fourth Geneva Convention, which clarifies the term "transfer" and establishes that: "In the absence of any clause stating that deportation is to be regarded as a form of transfer, this article would not appear to raise any obstacle to the right of parties to the conflict to deport aliens in individual cases when State security demands such action.[21] However, practice and theory both make this right a limited one: the mass deportation, at the beginning of a war, of all the foreigners in the territory of a belligerent cannot, for instance, be permitted."[22]

It follows from the above that collective expulsion, whether in times of peace or war, is excluded under international law. That being the case, the issue of whether a distinction should be made between peaceful and hostile aliens is no longer relevant in the context of collective expulsions. However, that does not mean that the criterion of the peaceful or hostile characteristics of the person concerned should not be taken into consideration in the procedure for the expulsion of an individual.

5. The question of whether an alien who has had to leave the territory of a State under an expulsion order that is subsequently found by a competent authority to be unlawful has the right of return

Russian Federation

[Original: English and Russian]

A priori, the alien has such a right [of return] provided that the legal grounds for his or her stay in the territory of a State are still in force. Otherwise, the right to return seems to depend on the ground on which an expulsion order is found to be unlawful. If, for example, expulsion of an alien has led to a violation of his or her right to respect for family life, the readmission of the individual appears to be an adequate "compensation". On the other hand, if an order of expulsion is found to be unlawful on account of a failure to comply with certain formalities, the only duty of the expelling State is to grant compensation for the damage caused to the alien expelled, without this necessarily entailing a right to return.

Switzerland

[Original: French]

In accordance with the Federal Act on Aliens,[23] legal remedies are governed by general provisions on federal procedure. According to these general provisions, the competent authority may execute its decision only when this can no longer be contested through a legal remedy, when the possible legal remedy does not have a suspensive effect, or when the suspensive effect attributed to a legal remedy has been withdrawn (Federal Act on Administrative Procedure, art. 39). Federal

[21] The French version of the commentary, published in 1956, appears to be more restrictive on this point. The corresponding passage reads: "[…] et lorsque la sécurité de l'État l'exige *absolument*" (emphasis added).

[22] Jean S. Pictet (ed.), *Commentary on the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, Geneva, International Committee of the Red Cross, 1958, p. 266.

[23] Federal Act on Aliens of 16 December 2005, RS 142.20, art. 112.

procedure stipulates that appeals have a suspensive effect, save in a few exceptional cases or unless otherwise provided for by law (Federal Act on Administrative Procedure, art. 55).

When no exceptions are foreseen and the Federal Act on Aliens does not provide otherwise, an expulsion will not be executed if it can be contested and the appeal has a suspensive effect. An alien subject to an expulsion order will therefore be present on Swiss territory while awaiting the decision of the competent authority.[24] In such a case, the question of a right of return therefore does not arise.

Nevertheless, in some cases of removal or expulsion, such as the immediate removal of an alien occasioning serious harm to public safety and order, the appeal does not have a suspensive effect. In such a case, the outcome of any appeal must be awaited while the appellant is outside the territory of Switzerland. If the appeals authority decides that the expulsion order has been unlawfully adopted, it may annul the contested decision and issue another ruling. In such a case, depending on the decision of the appeals authority, the alien may be granted the right of return.

It should also be mentioned that when an application against an expulsion order is lodged with the European Court of Human Rights, this appeal does not have a suspensive effect. The Swiss authorities therefore remove the alien before a judgment is delivered by the Strasbourg Court. If the Court concludes that an expulsion was executed in violation of the European Convention on Human Rights, the alien in question will not be granted an automatic right of return. However, the competent cantonal authorities will generally issue a new authorization to enter Switzerland, provided that there is no other reason to deny it.

Lastly, although strictly speaking this is not a right of return resulting from the acknowledgement of an unlawful expulsion, it should be mentioned that the readmission agreements that Switzerland has concluded with other States generally include a provision whereby the State requesting the readmission of a person to his (presumed) country of origin is obliged to readmit him to its territory if it is subsequently established that the person does not hold the nationality of the country in question (i.e., "readmission").

6. Criteria that could be used to distinguish between the expulsion of an alien and the question of non-admission; more specifically, determining the point at which the removal of an illegal immigrant is governed by the expulsion procedure and not by the non-admission procedure

Russian Federation

[Original: English and Russian]

A main criterion for drawing a distinction between these two procedures seems to be the "territorial" one, since it is not feasible to expel a person who is not present in the territory of the expelling State. Such a person can only be denied admission. Thus, non-admission means preventing a person who is actually outside

[24] It should be noted that the procedure for removal will be amended following the implementation of the Schengen and Dublin Agreements in Switzerland. Indeed, pursuant to the provisions of the Dublin Association Agreements, the removal will be immediately enforceable and the appeal against the order for removal will not have a suspensive effect.

the territory of a State from entering that State, while expulsion means forcing a person who is actually in the territory of a State to leave that territory.

Given that, it would be justifiable to exclude the territorial sea, the internal waters and the frontier zone from the definition of "territory" for the purposes of the draft articles under consideration. With a special regime applied to aliens in the areas mentioned above, such aliens are unlikely to be subject to expulsion. We are not convinced that this situation should be within the scope of the draft articles.

Switzerland

[Original: French]

The provisions of the Federal Act on Aliens always address issues related to the denial of a residency permit and the non-extension of a residency permit within the same context. This implies that, generally speaking, no distinction is made between removal within the context of the non-admission procedure (denial of a residency permit) and removal within the context of the expulsion procedure (non-extension of a residency permit).

However, the Federal Act on Aliens contains a clause on the special case of return at the airport.[25] This clause is applicable when an immigrant is refused entry to Switzerland during border controls at the airport. In such a case, the alien is required to leave Swiss territory without delay. The competent office issues a decision within 48 hours. This decision is subject to appeal within a very short period (48 hours) after notification is given. The appeals authority is required to issue its ruling within 72 hours. Until the forced return of the alien is ordered, he may be held for up to 15 days in the transit zone in order to prepare for his departure. Up to that point, this is a non-admission procedure.

In cases where an alien cannot be returned, owing to the risk of torture or any other cruel or inhuman treatment or punishment, for example, he is granted temporary admission. The alien in question is therefore no longer an "illegal immigrant". Consequently, the person concerned is no longer subject to the non-admission procedure. His case will periodically be examined to determine whether the person may remain in Swiss territory or whether he or she will be returned (under the expulsion procedure).

On the other hand, if the person concerned intends to apply for asylum and satisfies the requirements contained in the Asylum Act,[26] his or her entry into Switzerland will be permitted so that he or she may submit an application for asylum. The alien will therefore no longer be subject to the non-admission procedure. If the competent authorities proceed to take removal measures, this will be under the removal or expulsion procedure and not the non-admission procedure.

[25] Federal Act on Aliens of 16 December 2005, RS 142.20, art. 65.

[26] Asylum Act of 26 June 1998, RS 142.31.

7. The legal status of illegal immigrants located in the territorial sea or in internal waters, or in the frontier zone excluding port and airport areas. Specifically, apart from port and airport areas, is there an international zone within which an alien would be considered as not having yet entered the territory of the State? If so, how is the extent and breadth of such a zone determined?

Russian Federation

[Original: English and Russian]

Apart from port and airport areas, the following territories may well be considered as international zones in the given sense (i.e., zones within which an alien would be considered as not having yet entered the territory of the State): the territories of railway or car stations/terminals open for international traffic as well as of other specifically designated localities in immediate proximity to the State border where admission to the territory of a State is exercised according to the national legislation. The extent and breadth of these zones are determined by domestic legislation.

Switzerland

[Original: French]

Not applicable to Switzerland.

8. State practice in relation to grounds for expulsion, and the question of whether and, where appropriate, the extent to which such grounds are restricted by international law

Germany

The German Residence Act (*Aufenthaltsgesetz, AufenthG*) sets out various grounds for expulsion. These include grounds based on the commission of criminal offences or convictions, as well as those related to terrorist or extremist activities and regulatory offences.

Mauritius

The Deportation Act of 1968 of the Republic of Mauritius governs the expulsion of aliens. Section 4 of the Act empowers the Minister of Defence and Security to make a deportation order in respect of: (a) a convicted person; (b) an undesirable person; (c) a destitute person; or (d) a prohibited immigrant. These categories of individuals are defined under the Act.

Russian Federation

[Original: English and Russian]

Question of whether the grounds for expulsion are restricted by international law

It seems pertinent to talk about the grounds only with regard to the expulsion of aliens lawfully present in the territory of a State (in respect of illegal aliens, the grounds are evident). General international law is unlikely to restrict the grounds for the expulsion of "lawful" aliens, save those of them enjoying special status: refugees and stateless persons as well as migrant workers and their family members who are documented or in a regular status.

Specific rules with regard to their expulsion are established by the Convention relating to the Status of Refugees of 28 July 1951[27] (arts. 32-33), the Convention relating to the Status of Stateless Persons of 28 September 1954[28] (art. 31) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 18 December 1990[29] (art. 56 (3)), respectively.

The regional level is characterized by a differentiated approach to restricting the grounds for expelling an alien. For instance, under article 1 of Protocol 7 to the European Convention on Human Rights of 22 November 1984,[30] the grounds for the expulsion of "lawful aliens" are restricted to the considerations of national security and public order. Such a restriction, however, applies only in cases of expulsion before the exercise of the procedural safeguards laid down in this article. The European Convention on Establishment of 13 December 1955[31] restricts the grounds for expulsion of residing aliens, including long-term residents (art. 3).

At the same time, grounds for the expulsion of aliens — at least of those who do not enjoy any special status — are, as a rule, at the discretion of a State, this principle being based on the very nature of the right to expel. Obviously, the grounds for expulsion shall not be discriminatory.

The practice of the Russian Federation with regard to the grounds for expulsion

Under the national legislation of the Russian Federation, there are two procedures relating to expulsion. These are: administrative removal of an alien or a stateless person and deportation.

Administrative removal is a measure of administrative responsibility of an alien or a stateless person for administrative offences. The latter are connected mainly with the breaching of the regime for stay of foreigners (stateless persons) in the territory of the Russian Federation, including the immigration regime and that relating to labour activity. The list of offences entailing administrative removal, as well as the procedure of assigning responsibility and execution of punishment, are clearly governed by the Russian Code of Administrative Offences.

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[27] United Nations, *Treaty Series*, vol. 189, p. 150.

[28] Ibid., vol. 360, p. 117.

[29] Ibid., vol. 2220, p. 3.

[30] European Treaty Series No. 117.

[31] European Treaty Series No. 19.

Deportation is applied to persons if the grounds for their legal stay (residence) in the territory of the Russian Federation have ceased and such persons do not leave the territory voluntarily. The cessation of the grounds mentioned above may follow the decision of competent authorities to reduce the term of stay (residence) of an alien (stateless person) or to annul the permission for his or her temporary or permanent residence in Russia. The list of instances in which such a decision may be rendered is exhaustive. It is contained in the Federal Law on Legal Status of Aliens in the Russian Federation.

Moreover, Russian legislation provides for a mechanism under which the competent authorities may decide on the undesirability of staying in respect of an alien (stateless person) lawfully staying in the territory of the Russian Federation. Such a decision may be rendered if the stay (residence) of a person creates a real threat to the defence or security of the State, or to public order or public health, as well as for reasons relating to the protection of the constitutional order, morality, or rights and legal interests of other persons. Aliens (stateless persons) whose staying is found to be undesirable should leave the territory of the Russian Federation voluntarily. Otherwise, they are subject to deportation.

Switzerland

[Original: French]

Grounds for expulsion under Swiss law

(a) The alien has been denied a residency permit, or the permit has been revoked or has not been extended ("ordinary return", Federal Act on Aliens,[32] art. 66);

(b) The alien does not have the required authorization ("return without a formal decision", Federal Act on Aliens, art. 64, para. 1 (a));

(c) The alien, during a stay that does not require authorization, no longer satisfies the conditions required by law to remain on Swiss territory without authorization ("return without a formal decision", Federal Act on Aliens, art. 64, para. 1 (b));

(d) The alien seriously or repeatedly causes harm to or endangers public order and safety, or represents a threat to internal or external safety (Federal Constitution, art. 121; "return without a formal decision", Federal Act on Aliens, art. 64, para. 3; "ordinary return", Federal Act on Aliens, art. 66, para. 3; and "expulsion", Federal Act on Aliens, art. 68, paras. 1 and 4).

Restrictions on the grounds for expulsion under international law and, where appropriate, their extent

Since Switzerland is a country that applies the monist theory, international law (conventional international law, since its entry into force in Switzerland, and customary international law) forms part of its domestic legal order. A law will therefore be interpreted in the light of both national law and international law. In principle, international law will have primacy over national law. Thus, international

[32] Federal Act on Aliens of 16 December 2005, RS 142.20.

law may restrict the application of national law, including legislation governing the expulsion of aliens. The competent judicial authorities will consequently examine each case of expulsion in the light of customary international law and the conventions and treaties to which Switzerland is a party.

In addition, the Federal Act on Aliens applies to aliens "to the extent that their legal status is not governed by other provisions of federal law or by international treaties concluded by Switzerland".[33] Consequently, the provisions of this Act, which include grounds for expulsion, are applicable only when no other federal act or provision of international law (such as the Convention relating to the Status of Refugees, of 28 July 1951) is applicable.

While the grounds for the expulsion of aliens are not restricted by international law today, the enforcement of expulsions is more broadly restricted by the obligations binding upon Switzerland under international law (see section II.B below).

B. Comments and information on other issues

Germany

The two-step process for ending residence in Germany must be taken into account when considering the question of restrictions imposed by international law. An alien's residence permit expires upon expulsion and his/her right of residence in Germany is thus terminated. He/she is therefore required to leave the country (sect. 50 of the Residence Act). Only once the requirement to leave the country has become enforceable, and it is not assured that the alien will leave voluntarily or reasons of public security and order make the supervision of the departure seem necessary, is the requirement to leave enforced by means of deportation (sect. 58 of the Residence Act).

International obligations may militate against both expulsion and deportation. For example, the considerations mentioned in article 8 of the European Convention on Human Rights[15] of 4 November 1950 and article 6 of the German Basic Law (Constitution) have been incorporated into the Residence Act in section 56 (special protection from expulsion in the case of family ties in Germany). Section 60 (2) and (5) of the Residence Act prohibit deportation (also because of the obligation under art. 3 of the European Convention) if there is a danger that the alien, once deported, would be subject to torture or inhumane or degrading treatment or punishment. These restrictions apply no matter what grounds for expulsion exist.

Mauritius

Under the Mauritius Citizenship Act of 1968 an alien is defined as a person who is not a commonwealth citizen or a British protected person. An alien may, subject to certain conditions, qualify for residency in the Republic of Mauritius: section 5 (1)(b) of the Immigration Act of 1973 provides that subject to its section 6, any person, not being a citizen, shall have the status of a resident for the purposes of

[33] Ibid., art. 2, para. 1.

this Act where, in the case of an alien, he has, before 10 December 1966, been ordinarily resident in Mauritius continuously for a period of seven years or more and has since the completion of that period of residence not been absent from Mauritius for a period of three years or more.

The Deportation Act of 1968 of the Republic of Mauritius governs the expulsion of aliens. Section 4 of the Act empowers the Minister of Defence and Security to make a deportation order in respect of: (a) a convicted person; (b) an undesirable person; (c) a destitute person; or (d) a prohibited immigrant. These categories of individuals are defined under the Act. Upon contemplation of the issue of a deportation order, the deportee must be served with a notice containing the reasons for his proposed deportation. Further, said notice shall require him to show cause before a Magistrate in Chambers as to why the order should not be made. The Minister will then consider the Magistrate's report and decide whether or not to issue the deportation order. If the Minister decides that one should be issued, the deportee will have a second opportunity to show cause in writing as to why the order should not be made.

The Immigration Act of 1973 of the Republic of Mauritius is mostly concerned with the question of the non-admission of persons as opposed to expulsion/deportation. Section 8 of the Act sets out a list of persons classified as "prohibited immigrants" for whom there is no right of admission to Mauritius. However, under section 8 (2) and (3), the Immigration Minister has the discretionary power to grant conditional admission to a person classified as a "prohibited immigrant". Furthermore, in some cases, section 13 (6)(b) of the Immigration Act gives a right of appeal to a passenger who has been refused admission to Mauritius. It provides that where a passenger to whom the Minister has refused admission to Mauritius claims to be a citizen, permanent resident or resident, an appeal shall lie with the Supreme Court against the decision of the Minister.

Lastly, the Passport Act of the Republic of Mauritius contains a section on the non-admissibility of persons to Mauritius: section 12(1) provides that the Minister may prescribe the countries, the nationals or citizens of which shall obtain a visa before entering Mauritius, and section 12(2) states that a stateless person, or, where regulations are made under subsection (1), a national or citizen of a country specified in the regulations shall not be allowed to enter Mauritius unless he has previously obtained a visa from the passport authorities.

Switzerland

[Original: French]

While the grounds for the expulsion of aliens are not restricted by international law today, the enforcement of expulsions is more broadly restricted by the obligations binding upon Switzerland under international law. In particular, Switzerland may not enforce an expulsion if this violates its human rights obligations, including the principle of non-refoulement. Switzerland has codified these obligations in its domestic law. For example, the Swiss Federal Constitution provides that no one may be returned to the territory of a State where he or she is in danger of being subjected to torture or any other cruel or inhuman treatment or punishment (see art. 25, para. 3). In more general terms, the Federal Act on Aliens[32] establishes that the enforcement of an expulsion or removal order "is unlawful when

the return of the alien to his State of origin, to the State from which he came, or to a third State, is contrary to the obligations binding upon Switzerland under international law" (Federal Act on Aliens, art. 83). The removal consequently cannot be enforced and the alien is granted temporary admission authorization.

Another example of a restriction on the enforcement of an expulsion arises from the primacy of the extradition procedure over the expulsion procedure. If an extradition request is submitted to Switzerland pursuant to mutual legal assistance in criminal matters, the person will be transferred to the requesting State in accordance with the applicable extradition procedure and not the expulsion procedure. Furthermore, it would not be permissible to use a readmission agreement for the purpose of extraditing the person concerned.